

Observations of ARPA Warriors

Twenty Years on the March

In 1982 when a fellow assistant United States attorney came into my office, announced that she was going on sick leave, and handed me her antiquities cases, I had no idea what I would be facing. I knew she had worked with the Federal Bureau of Investigation (FBI) to investigate the theft of a family of Hopi katsinas and that the case had ended badly. The Hopis were not amenable to divulging the description of the stolen gods, so the FBI was stymied. My first inquiries to defense attorneys in the naïve hope that promises of amnesty would bring their return garnered a response that the katsinas would be burned. I traveled to Second Mesa, AZ, to meet with the Hopi elders, which enabled me to put a painful face on the daunting task for an attorney. At stake was the physical embodiment of a culture. In one act of theft hundreds of years of clan existence was brought to a halt. Katsinas are the physical embodiment of Hopi gods. Some of the katsinas were over 1,000 years old. These cases would not be like the prosecution of drug cases where the suppression of evidence in a faulty search would end in the destruction of contraband and fresh opportunities for miscreants. The object of these cases was the protection and recouping of irreplaceable bits of history and culture. Mistakes would be unforgiving. The task was weighty, and I was ill prepared.

In this article, I offer a personal reflection on the progress of investigating and prosecuting the Archaeological Resources Protection Act (ARPA) over the past two decades. Twenty years ago the number of people who had a working knowledge of ARPA could be counted on one hand. I sought help from all of them. The Federal Law Enforcement Training Center (FLETC) offered the first training on ARPA at Marana, AZ, for law enforcement agents and archeologists. The message of the lawyer instructing the initial courses was that the law was deficient in its task. This was of little help, so I turned to three other sources for aid: archeologists, agency law

enforcement agents, and the Washington office of the National Park Service (NPS). The efforts of these sources chronicle the progress of cultural resource protection in the United States.

Any savvy prosecutor knows that the first thing you do when handed a case dealing with unfamiliar turf is to ask for schooling from the law enforcement agents who are immersed in the area, and breathe deeply. The law is of little use without field knowledge. Fortunately, the land management law enforcement agents are among the highest caliber of agents in the Federal service. They have camped out in rattlesnake infested areas and donned scuba gear in frigid rivers to stake out sites where looting may occur. They produce excellent reports, which form the basis of successful cases. And they clean up nicely for court to enthrall juries with their testimony. No fictional story can compete with the real life experiences of the agents who track looters into wild terrain while armed looters are tracking them. Investigative successes deserve wide attention because of scrupulous and innovative techniques of gathering evidence. For instance, successful cases have been made when potsherds left at the scene were fitted to those found in the suspect's possession. The ancient mummy of a Native American infant, long since disinterred and sold by thieves, was eventually sold to undercover agents and traced back to its resting place on Government land by soil analysis. A looter was connected to the site of massive destruction when a plaster cast taken in the excavation matched the unique shape of his trowel.

Specialized training has enhanced the passion agents bring to their work. FLETC can now boast of thousands of ARPA training course alumni. Over the years, training also has been offered by agencies regionally, the University of Nevada, Reno, and by private consultants. Most training sessions cross disciplines, so in addition to obtaining substantive knowledge of law enforcement techniques, agents, archeologists, and attorneys learn to work as a quick response

team. It is not unusual for a team to make an ARPA case soon after their training.

Twenty years of ARPA also have changed the working lives of archeologists. Field archeologists are still the first to learn of an ARPA crime. Park visitors and forest campers will approach archeologists to make a report because the archeologist is visible, knowledgeable of the resource, and caring. Twenty years ago archeologists had difficulty enlisting law enforcement agents to investigate an ARPA case. Then when working together, they had problems making protection of archeological resources a management priority. The number of archeologists on the staffs of land managing agencies dwindled in the 1980s despite the proliferation of looting activities. Today Federal agency archeologists still have crushing workloads, but their quest to preserve cultural resources is aided by the visibility of numerous successful ARPA prosecutions. The power of the positive press release has drawn agency resources to the service of protection efforts, while also sending a cautionary message to would-be looters.

One archeologist, however, has become the leader of his profession in investigating ARPA crimes and teaching ARPA protocols. Twenty years ago, Tonto National Forest, AZ, archeologist Martin McAllister was stung when he was ordered to deliver to looters ancient pottery exhumed from public lands when the evidence was suppressed in a Federal prosecution. He resolved to dedicate himself to developing forensic archeology and training others to produce site damage assessments, the nucleus of an ARPA prosecution. In 1984, McAllister was heartened to receive on behalf of the U.S. Forest Service the title to the truck of an ARPA defendant forfeited as part of the case. Such forfeitures are now commonplace in ARPA cases and there is a legion of archeologists skilled in producing site damage assessments for use as evidence in civil and criminal cases.

Twenty years ago Departmental Consulting Archeologist Bennie Keel and NPS archeologist George Smith had a vision that ARPA would become the vehicle to reach outside of the community of archeologists to engage resource managers, lawyers, and tribes in the protection of cultural resources. They educated future land managers, sponsored training, and drove others to write books and articles to heighten protection efforts. That torch passed to Richard Waldbauer and David Tarler who have taken NPS cultural

resource training into law schools and have built bridges of cooperation between NPS and the United States Justice Department, United States State Department, United States Customs Service, and government agencies in Mexico and Canada. NPS and the Justice Department offer intense training to 100 civil and criminal lawyers annually and arm them with an encyclopedia of cultural resource legal materials. As a result, ARPA cases have expanded from protecting ancient Indian burials in the West and historic settlements in the East, to protecting archeological resources stolen from private land, foreign libraries, and submerged shipwrecks.

Twenty years, however, have produced setbacks to ARPA enforcement. In 1998, a Federal trial judge refused to accept as evidence of damages the archeological value specified in the law and regulations. In 1999, the Ninth Circuit Court of Appeals, which covers the Western States, Alaska, and Hawaii, delivered an almost fatal blow to ARPA criminal enforcement by requiring a new and unique standard for proof of the intent of the perpetrator. For 5 years, litigation that seeks to eviscerate the requirement of an ARPA permit to conduct scientific data recovery from Federal lands has been proceeding in a Federal magistrate's court.

To maintain positive momentum in the next 20 years, the formula of training professionals and engaging the public in archeology is still valid. In addition, law schools must recognize cultural property concepts as an integral part of property law courses. Courses on cultural property law, historic preservation law, and public lands management should be commonplace in law schools and graduate programs. The American Bar Association and State bar associations must develop cultural property law sections. The focus of training must expand beyond the application of laws to the development of a theoretical construct for resolving the unique issues of the future. Legal culture is not an oxymoron when put to such a high purpose.

Twenty years ago I felt inept and alone when I met with the Hopi elders. Today I feel the camaraderie of a smiling cadre of archeologists, agents, and lawyers, all well armed for the task.

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